No. 82-2128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

v.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC. and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1, the National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case.

I.

STATEMENT OF INTEREST

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto

Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities. The NARUC contains the State officials charged with the duty of regulating communication common carriers within their respective States. As such, they have the obligation to assure the establishment and maintenance of such communication service and facilities as may be required by the public convenience and necessity and the furnishing of service at rates that are just and reasonable. Because, as discussed below, sustaining the damage award in this case could result in increases in local rates, the NARUC and its members may be adversely and directly affected by the outcome of this case.

II.

REASONS FOR GRANTING THE MOTION

Pursuant to Section I(A) of the consent decree entered on August 24, 1982 in *United States v. Western Union,* Docket No. 82-0192 (D.D.C.), AT&T and the U.S. Department of Justice agreed upon, and submitted to the district court for approval, a plan of reorganization for a divested AT&T. On July 8, 1983 the district court issued an opinion approving the plan subject to several modifications being agreed to by the parties.[1]

Under the plan of reorganization, both as initially formulated and as modified by the district court, AT&T's contingent liabilities[2] are apportioned among AT&T and

[1] As of today, these modifications have not been agreed to.

[2] Contingent liabilities are liabilities which are attributable to pre-divestiture events but do not become certain, and are therefore not booked, until after divestiture. *U.S. v. Western Union,* Docket No. 82-0192, July 8, 1983 Opinion at n. 39. Contingent liabilities include liabilities for antitrust claims.

the local Bell Operating Companies on the basis of their relative net investment as of the date of the plan's implementation. Under Section VIII(H) of the decree, a proportionate share of the system's consolidated debt and equity is allocated to each Operating Company. The plan of reorganization provides that the post-divestiture entities will share in the contingent liabilities on the same basis.

If the $276,000,000 ($276 million) antitrust judgment against AT&T in this case is allowed to stand, each local Bell Operating Company will be liable for a portion of this amount. This amount will, either directly or indirectly, ultimately be recovered from the Operating Company's local ratepayers pursuant to tariffs approved by the applicable State utility commissions. The NARUC, charged with the duty and responsibility, through its members, of assuring that local telephone rates are not prohibitive, therefore has important reasons for urging that this Court hear this case. In representing State regulators, the NARUC also offers a unique perspective on the issues that should be useful to the Court's deliberations on whether to grant AT&T's petition for writ of certiorari.

III.

CONCLUSION

For the reasons stated above, the National Association of Regulatory Utility Commissioners respectfully requests the Court to grant this motion so that the NARUC may present its views in the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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and the furnishing of service at rates that are just and reasonable.

If the $276,000,000 ($276 million) antitrust judgment in this case is allowed to stand, each of the Bell System Operating Companies will be required to contribute a proportionate share for payment of the judgment.[1] This amount will, either directly or indirectly, ultimately be recovered from the Operating Company's local ratepayers pursuant to State utility commission approved tariffs and could very likely cause increases in these tariffs. The NARUC, charged with the duty and responsibility, through its members, of assuring that local telephone rates are not prohibitively expensive, therefore has legitimate reasons for urging that the Court hear this case.

SUMMARY OF ARGUMENT

AT&T's filing and maintenance of the PCA[2] requirement, as well as its opposition to certification standards, was conduct protected under the *Noerr-Pennington* doctrine because it represented the espousal of a position before an administrative body. This conduct did not fall within the "sham" exception to *Noerr-Pennington* because it did not constitute the invoking of an administrative process for the injury that the process alone would work upon competitors.

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[1]Pursuant to provisions contained in the plan of reorganization of AT&T formulated pursuant to the consent decree entered into between AT&T and the U.S. Department of Justice in *United States v. Western Electric*, Docket No. 82-0192 (D.D.C.).

[2]"Protective Connecting Arrangement."

ARGUMENT

I. THE CONDUCT OF AT&T UPON WHICH THE JUDGMENT AGAINST IT WAS BASED WAS PROTECTED UNDER THE *NOERR-PENNINGTON* DOCTRINE

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) involved a publicity campaign waged by the railroad industry as part of its dispute with the trucking industry over control of interstate, heavy freight hauling. Representatives of the trucking industry sued a railroad trade association, alleging that a publicity campaign advocating pro-railroad legislation violated the Sherman Act because the company's sole purpose was to hinder the trucking industry's ability to compete with the railroads. The Court held that the Sherman Act was inapplicable because the railroads' activities constituted the "mere solicitation of governmental action with respect to the passage of and enforcement of laws." 365 U.S. at 138, 81 S.Ct. at 530. Whether the activities could be considered fraudulent or deceptive was immaterial and the question of intent was irrelevant.

> [I]nsofar as the railroads' campaign was directed toward gaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had. 365 U.S. at 139-140, 81 S.Ct. at 530.

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), restated, and to some extent amplified, *Noerr. Pennington* reaffirmed *Noerr's* holding that anticompetitive intent did not make an otherwise legitimate attempt to secure governmental action illegal. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670, 85 S.Ct. at 1593.

Pennington also made it clear that efforts directed at agencies were protected.

Finally, in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the *Noerr-Pennington* doctrine was broadened and strengthened by the Court's holding first, that it applied to administrative and adjudicative proceedings and, second, that it was constitutionally based. 404 U.S. at 510-511, 92 S.Ct. at 611.

Regardless of AT&T's intent, its filing and maintenance of a tariff which required interface hardware (the "protective connecting arrangement" or PCA) to interconnect terminal equipment, as well as its opposition to certification, represented conduct protected under *Noerr-Pennington.* AT&T's conduct constituted legitimate advocacy before an administrative agency and, as such, cannot be the basis for imposing antitrust liability.

Furthermore, AT&T's conduct did not constitute a "sham" which would deny it the protection of *Noerr-Pennington.* The sham exception comes into play when the process of administrative decisionmaking is invoked solely for the injury that the process alone will work upon competitors. *California Motor Freight, supra,* 404 U.S. at 513, 92 S.Ct. at 613. Here, AT&T truly sought by its conduct to influence the Federal Communications Commissions' decisions regarding certification and its PCA tariff and it had a reasonable expectation of obtaining a favorable decision from that agency. There is no evidence that AT&T's conduct was intended to injure Litton directly rather than through an FCC determination. As such, its conduct did not amount to the sort of abuse that falls within the *Noerr-Pennington* sham exception.

Finally, it is difficult to overrate the importance of the *Noerr-Pennington* doctrine to the State regulatory bodies charged with the responsibility of regulating the utility industry. *Noerr-Pennington* serves to facilitate the free flow of information between the State regulators and industry by insuring that antitrust concepts which are alien to the regulatory framework do not interfere with the States' ability to obtain the views, information and data necessary to regulate fairly and effectively. By rejecting *Noerr-Pennington* the court below has created an unnecessary chilling effect on the free flow of information between regulators and those they regulate.

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be granted and the case set for oral argument.

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